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FRITZ E. ATTAWAY
SENIOR VICE PRESIDENT
GOVERNMENT RELATIONS

May 12, 1993

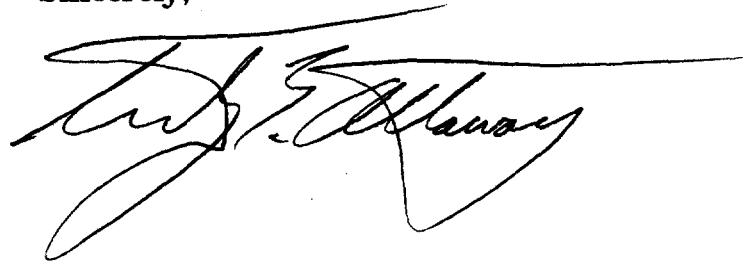
Donna Searcy
Secretary
Room 222
Federal Communications Commission
1919 M St. NW
Washington, D.C. 20554

RE: MM Docket No. 92-264
Implementation of the Cable Television Consumer Protection Act of 1992 - Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions

Dear Ms. Searcy:

Attached please find an original and nine copies of the reply comments of the Motion Picture Association of America (MPAA) in the above-referenced docket. Please let me know if there are any questions.

Sincerely,



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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11	)	
and 13 of the Cable Television	)	MM Docket No. 92-264
Consumer Protection and Competition	)	
Act of 1992	)	
	)	
Horizontal and Vertical Ownership	)	
Limits, Cross-Ownership Limitations	)	
and Anti-Trafficking Provisions	)	

TO: The Commission

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA") hereby respectfully submits its reply to comments received by the Commission on the "Notice of Proposed Rulemaking and Notice of

Commission to adopt certain specific limits on horizontal concentration and vertical integration; our recommended limits were expressly premised on the satisfactory conclusion of those two related dockets.

The Commission received comments from a number of cable operators and vertically integrated cable programmers recommending

inescapable, and Congress has given the Commission clear guidance on how to achieve a reasonable balance of interests in order to ensure that its rules pass First Amendment muster. The limits proposed by MPAA would advance a substantial government interest -- promoting programming diversity and competition -- through very narrowly tailored means with little or no practical impact on the legitimate First Amendment interests of cable operators or vertically integrated cable programmers.

II. A Horizontal Concentration Limit of Greater Than 25 Percent of Homes Passed Would Be At Odds with the Purposes of the 1992 Cable Act.

MPAA urged the Commission to limit the ownership or control of cable television systems by a single operator to not more than 25 percent of homes passed. The National Cable Television Association (NCTA) and other cable operators[4] propose horizontal concentration limits of as much as 30 to 40 percent. Those seeking higher limits

Communication, Los Angeles. As the professor observes, "the rate at which an MSO can accumulate bargaining power (i.e., monopsony power) [vis-a-vis a programmer] is an empirical question. It is clear, however, that this rate has nothing to do with the standard interpretation of the Herfindahl Index, because virtually none of the cable system buyers are competing with each other for programs."[5]

It is no answer to suggest, as NCTA does, that because some cable program services have "survived" with less than a 60 percent penetration of cable households, it is reasonable to permit a cable operator to grow so large as to potentially deprive a programmer of 40 percent of the market. Even under the exceedingly liberal standards proposed by MPAA, if more than one operator approaches the 25 percent concentration figure, an independent programmer may find its potential market access limited to only 50 percent of the homes-passed universe.

We believe that these weaker limits would create a gross imbalance between the public policy goals of the 1992 Act, to the detriment of competition and consumers. Those weaker limits should be rejected, and MPAA's proposed 25 percent ownership cap should be adopted.

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[5] Comments of Professor David Waterman at 2.

III. The Channel Occupancy Limits Proposed by MPAA Strike a Reasonable Balance Between Statutory Goals and Should Not Be Weakened.

MPAA advocates new Commission rules to bar a cable operator from devoting in excess of 20 percent of its activated channels to program services in which the operator has an ownership interest, direct or indirect, of 15 percent or greater.

MPAA has endorsed channel occupancy limits that apply only to "national" program services, would affect only those program services under common ownership with the cable operator, would grandfather current carriage of vertically integrated program services, would permit the Commission to consider all activated channels in applying the cap, and would require a substantial (15 percent) ownership interest in a program service in order to be counted against the cap. We endorse such liberal rules on the express condition that the Commission adopt workable and effective anti-coercion and leased access rules.[6]

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[6] MPAA, along with the Commission and virtually every other party to this proceeding, understands that Section 613 requires the Commission to consider limits on the total number of channels a cable operator may dedicate to program services in which it has an attributable interest. However, Turner Broadcasting Service ("TBS") urges a tortured reading of Section 613 (at 14-15). TBS would have the Commission set the limit in terms of the number of channels <u>owned by a single "video programmer"</u> (apparently to be defined as a corporate entity, such as TBS or Discovery Communications) in which the cable operator has an attributable interest. This is the difference between saying that (e.g.) TCI cannot dedicate more than eight channels of its 40-channel system to co-owned program services, and saying that TBS (in which TCI

Turner Broadcasting System ("TBS") challenges channel occupancy limits on largely the same grounds that it has repeatedly challenged the must-carry rules. TBS says the limits could "inhibit TBS's and other vertically integrated programmers' ability to gain access to cable systems in order to effectively compete and to make an increased commitment to new programming..."[7] However, this is a very different situation. While the must-carry rules may arguably make local broadcast station a "favored speaker," to the exclusion of TBS, in this case the vertically integrated programmer -- TBS -- is itself the favored speaker, and the disadvantaged speaker -- the independent programmer -- may have no other means of reaching a viewing audience.

Whatever the merits of TBS's case against the must-carry rules, its analogy is inapposite. As a vertically integrated programmer, TBS has a guaranteed outlet -- its co-owned cable systems. An independent program network has no such guarantee, nor, in many cases, has it any alternative outlet to reach the viewer. In this regard, it stands in contrast to the local broadcaster who, TBS would argue, has an alternative means of access to the home: its over-the-air signal.

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has an attributable interest) cannot occupy more than 8 channels on that system, and that Discovery (in which TCI has an attributable interest) cannot occupy more than 8 channels on that system, etc. TBS' scheme would obviously defeat the purpose of Section 613 -- which is to promote diversity of programming sources -- and should be rejected.

[7] TBS at 20.

Some vertically integrated programmers appeal to the Commission's sympathies by arguing that their ability to establish an adequate viewership and financial base will be seriously harmed by channel occupancy limits.[8] We submit that the challenges facing the vertically integrated programmer are dramatically compounded in the case of a competing, independently owned program service. The Commission should not vitiate a statute that is intended to give the independent programmer some chance to compete with the vertically integrated service.

We strongly disagree with proposals that the Commission not count (i) program services that are carried by some percentage of non-affiliated cable operators,[9] (ii) program services that are "multiplexed," (iii) new vertically-integrated program services[10], or (iv) program services with a "small audience"[11] against the occupancy cap.

We fail to see the relevance of widespread cable industry carriage of a vertically integrated program service to the purpose of the statute. Widespread carriage can reflect any of a number of

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[8] See, e.g., Discovery at 12-15, TBS at 20-22.

[9] See, e.g., Viacom International, Inc. at 4; Discovery Communications at 18.

[10] See, e.g., Viacom International, Inc. at 8-9; Discovery Communications at 18.

[11] Cablevision Systems Corp. at 11.

factors, not necessarily limited to whether consumers would consider the program service in question to be superior to a non-vertically integrated one. Moreover, because a given program service may not be able to survive without the substantial audience base of a single large MSO that carries a competing vertically integrated service, cable operators may find that they have no other practical choice but to take the vertically integrated program service.

Each channel devoted to a multiplexed service should be counted as one channel for purposes of the occupancy limits. A three-channel multiplexed service occupies three channels that could be put to other uses; each of the channels provides the programmer with a separate subscriber fee and (in the case of basic service) advertising revenue stream. It is inarguable that multiplexed channels that merely offer "time-shifted" programming do not provide diversity in programming or sources as compared with an independent programmer.

Exempting new program services from the channel occupancy cap would only exacerbate and perpetuate the current problem. The best chance for a new independent programmer to reach an audience is to develop an attractive new format. Obviously, if one or more major cable operators decide to place their financial support behind another new directly competitive program service, the independent programmer's chances of success disappear. Diversity of programming <u>sources</u> would not be enhanced by such an exemption.

We also strongly oppose a presumption that caps should be lifted when a cable system faces "effective competition"[12] or achieves a particular channel capacity.[13] As noted in our original comments, if a multichannel operator that provides "effective competition" for rate regulation purposes is itself highly vertically integrated, it may not provide a viable alternative for the independent programmer. And the mere fact that a cable operator might one day soon offer hundreds of channels is no guarantee that every independent programmer with an attractive product will have access to those channels. In any event, neither "effective competition" nor unlimited channel capacity characterizes today's cable television marketplace. The Commission can safely, and fairly, defer consideration of these changed circumstances until such time as circumstances actually change.

The Commission should not establish attribution criteria higher than the 15 percent recommended by MPAA. While the five percent standard from current broadcast attribution rules may be

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[12] We would especially oppose NCTA's proposal (at 34-35) to lift the cap for a cable system that meets the definition of "effective competition" by dint of its failure to achieve a subscriber penetration of 30 percent or more. The purpose of the new rule is to ensure access to potential cable subscribers, and that is reflected in the near-unanimous support for setting horizontal limits based on homes passed rather than subscribers. By exempting a low-penetration system from these requirements, the Commission would foreclose the independent programmer's access to 100 percent of homes passed in that service area.

[13] See, e.g., Viacom International, Inc. at 8-9; Discovery Communications at 18-19.

too low, the proposed alternatives[14] are far too high. A cable operator need not have voting control of a program service in order to have substantial financial incentives to favor that service. MPAA's proposed standard is a reasonable middle ground that fairly captures those situations where favoritism is likely to occur.

NCTA's proposal that "the presence of unused leased access capacity should be an affirmative defense" to a challenge based on channel occupancy should be rejected. Current leased access regulations do not work. New leased access requirements have only just been released, and it will take some years to test them in the marketplace to determine whether they provide a viable alternative for independent programmers.

IV. The Commission Should Establish A Complaint Process for Review of Alleged Violations of Either Its Horizontal or Vertical Curbs.

Several cable industry commenters urge the Commission not to create a public complaint process for challenging alleged violations of the horizontal concentration cap.[15] Some local regulators urge the Commission to delegate to local authorities the

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[14] See, e.g., Cablevision Industries at 38 (25 percent); NCTA at 20-21, Discovery Communications at 19-20, Viacom International, Inc. at 16, n. 22 (50% or more voting control).

[15] See, e.g., NCTA at 2-23.

right to review alleged violations of the horizontal or vertical limits. MPAA opposes both recommendations.

The Commission should establish reasonable and non-burdensome procedures to accept public complaints regarding violations of the horizontal or vertical limits. In view of the core intended purpose of the statutory provision -- to preserve the ability of independent programmers to reach cable subscribers -- programmers plainly should be granted standing to challenge alleged violations of these limits.

These limits represent the kind of policy matters that are best addressed by the expert federal agency, not by local franchising authorities.

V. Conclusion

The horizontal and vertical limits proposed by MPAA are reasonably tailored to accomplish the important and legitimate public policy goals underlying the statutory directive. They would not disrupt existing industry investments, and would not chill further system acquisitions or programming investments by the vast majority of cable companies. They would significantly complement the effectiveness of the anti-coercion and leased access rules that the Commission is now adopting. We urge the Commission to adopt

horizontal concentration and channel occupancy rules as proposed by MPAA in its initial comments in this proceeding.

Respectfully submitted,

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

By: _____
Fritz E. Attaway

_____
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DATED: May 12, 1993

CERTIFICATE OF SERVICE

I, Frances Seghers, do hereby certify that I have, on this 12th day of May, 1993, sent a copy of the attached "Reply Comments of the Motion Picture Association of America, Inc." in MM Docket No. 92-264 by first class United States mail, postage prepaid, to the following:

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